No. 01-1122

Supreme Court, U.S.
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# In The Supreme Court of the United States

**TERRY BELK, et al.,**

*Petitioners,*

**v.**

**WILLIAM CAPACCHIONE, MICHAEL GRANT, et al.,**
**and**
**THE CHARLOTTE-MECKLENBERG BOARD OF EDUCATION, et al.,**

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether the courts below properly concluded that the Charlotte-Mecklenburg Schools had obtained unitary status given the overwhelming evidence of good faith compliance with the desegregation orders including decades of sustained high levels of racially balanced schools and affirmative efforts to eradicate all vestiges of past discrimination to the extent practicable?

(2) Whether the findings of the courts below that CMS had complied with the desegregation orders to the extent practicable, were clearly erroneous?

(3) Whether the courts below abused their discretion by refusing to consider cumulative and speculative evidence of a theoretical student assignment plan that had not been implemented prior to the unitary status hearing?

## LIST OF PARTIES

Respondents agree with the list of parties contained in the Petition for a Writ of Certiorari with the exception that Lawrence Gauvreau is no longer a party to this case.

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## STATEMENT OF THE CASE

Petitioners Statement of the Facts is deficient because it omits multiple material facts and repeatedly misstates facts. Respondents submit the following to correct these omissions and errors.

### 1. Petitioners' Long Term Acquiescence in What They Now Allege to be "Violations" of the Desegregation Order

In long running desegregation cases, it is essential to evaluate the history of the case to determine whether and how often the plaintiffs had to return to court to compel the school system to abide by the desegregation order. This is a particularly important inquiry in the context of a judicial determination as to whether a school system has achieved unitary status.

For the nearly one quarter of a century encompassing the period during which Petitioners now claim the Charlotte-Mecklenburg Board of Education (CMS) failed to effectively desegregate its schools, they never "alleged failure by the board to comply with the district court's desegregation orders." (16a). Indeed, even though "two generations of students ha[d] passed through CMS . . ." during this time, "not one person . . . returned to court alleging that segregative practices ha[d] been continued or revived." (6a, 339a). The district court has never sanctioned or enjoined CMS for failure to comply with its orders. (339a). In fact, the only sanctions imposed on CMS since 1974 have been in the current litigation over unitary status due to "its over zealous attempt to keep the desegregation orders in place . . ." by improperly concealing trial witnesses. (339a-340a).

During the two month unitary status trial, it became obvious that CMS and Petitioners had been colluding for decades to delay any declaration of unitary status. There was consensus that a race-based student assignment plan was desirable, not just as an agent to bring about desegregation, but as a means to combat demographics change to foster long term racial diversity in all system schools. That explains why Petitioners only voiced "objections" to the desegregation process when a

declaration of unitary status, and a corresponding end to court ordered busing, were sought by Respondents.

In moving to reopen the old *Swann* desegregation case, inactive since 1975, Petitioners did not seek any specific remedy aimed at correcting any alleged resegregative act by CMS. (17a). Petitioners generalized criticisms of CMS's thirty year record of desegregation were asserted as a defensive measure taken in response to Respondent Capacchione's lawsuit challenging the continued use of strict racial quotas in the magnet school admission process. The fact CMS then sided with Petitioners in seeking to prolong federal supervision is ample proof of the collusion, aimed not at desegregation, but at sustaining and legitimizing the indefinite use of racial quotas in the student assignment process.

**2. CMS's Continuous Record of Good Faith Compliance with the Desegragation Orders**

CMS took the counter-intuitive position at trial that it had failed to comply with the desegregation orders. Yet, several former school board members testified that the court's desegregation orders had become "institutionalized", and there had been unfailing compliance with the desegregation orders. (49a). One former board member testified that, during her ten year tenure, "every board member she ever worked with was committed to complying with the desegregation order." (343a). In fact, CMS's own expert prepared a 1992 report which concluded that CMS had always, 'in good faith, complied with the orders of the court." (49a-50a).

Former CMS superintendent, Dr. John Murphy, testified that, by 1992 "CMS was unitary . . . ." (50a). Moreover, he conceded that "no effort was made to dissolve the court order" because, *inter alia,* he thought it was politically preferable "to remain under court order so CMS could continue to racially balance schools even though the de jure violation had been remedied." (51a).

The appeals court said it best in concluding the desegregation orders had "been institutionalized to the point that CMS officials [could not] imagine life without them".

(51a). CMS had transformed the desegregation order, intended to be a temporary measure to eradicate vestiges of past discrimination, into "mechanisms for the attainment of different goals." (52a). CMS institutionalized the desegregation process by going "beyond what the Court's orders required" and racially rebalancing schools on an annual basis when demographic change, not *de jure* discrimination, caused a school to fall outside the 60/40 racial quota used by CMS as a benchmark for racial identifiability (340a). For example, CMS's quota driven magnet school plan was adopted in 1992 when Dr. Murphy was superintendent for the express purpose of ameliorating the impact of massive demographic shifts on the racial composition of certain schools. (*Id.*). Dr. Murphy admitted it was adopted in response to the "difficulty in bringing about racial balance . . . because of the demographic shifts that were occurring." (25a).

Another essential inquiry in a unitary status case is to determine whether CMS is likely to return to a policy of racial segregation if local control of the school system was restored. Petitioners make no such contention for good reason. First, the case was essentially closed in 1975, when the district court placed it on inactive status believing unitary status was imminent. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 67 F.R.D. 648 (W.D.N.C. 1975). Second, CMS has maintained a well integrated school board throughout the period of court supervision. (*Id.*) At the time of trial and presently, four of the nine board members are black. The long time incumbent Chairman, Arthur Griffin, is black. (*Id.*) The Vice Chairperson, Wilhelmenia Rembert is also black. Moreover, racial harmony on the board is a proud tradition with white members of the board consistently voting with black board members on matters relating to desegregation. (*Id.*) Third, the fact CMS spent millions of dollars in attorneys fees opposing unitary status should send an unequivocal message that it will never return to any policy or practice that racially discriminates against African Americans. The conundrum in this case is CMS's blind spot

regarding discrimination against other races which forced parents to file the suit that restored local control of the school system.

The courts below found "CMS routinely reaffirmed its commitment to integration." (341a). CMS's mission statement had "become a mantra" that openly advocated its long term goal of racial diversity and its ambition to be "the premier urban, integrated system in the nation." (341a).[1] The district court specifically found "no evidence of racial animus or discriminatory intent in any school board actions during the thirty years that CMS has been under court order."(*Id.*) CMS even stipulated that it never "acted with a racially segregative purpose." (*Id.*) Ultimately, the district court found, and the Petitioners now concede, that "[t]here can be no serious contention that CMS has been uncommitted to the *Swann* desegregation orders." (344a). Echoing this finding, the court of appeals observed that "CMS officials cannot imagine life without . . ." the desegregation orders and that it was "struggling to keep the orders firmly in place" despite the fact that they are designed to be temporary. (51a-52a). This led the court of appeals to correctly conclude that "it is unthinkable that CMS will attempt to revive the dual system." (52a). That finding is reinforced by CMS's decision not to appeal from the *en banc* decision of the Court of Appeals declaring the school system to be unitary.

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[1] CMS was so committed to maintaining the 60/40 level of racial integration that a unanimous board advocated building "low-moderate income housing" at public expense throughout the county (341a-342a). CMS even appointed a task force to evaluate and recommend how such construction projects might foster more integrated housing policies that would combat the demographic shifts in Charlotte's population. (342a).

The district court squarely placed the burden of proof for showing the vestiges of past discrimination had been eradicated upon Respondents. (253a). To evaluate the level of racial balance within CMS, the district court applied a standard for evaluating the schools of +/- 15% of the system-wide average of black and non-black students which was clearly "more restrictive than necessary." (259a) Even under this restrictive standard, the district court found, and Petitioners concede, that "CMS has maintained a high level of desegregation since 1970." (262a). During this period, less than 30% of CMS schools have deviated from this racial balance standard for more than three years. (*Id.*) That is, over 70% of CMS's schools have been within this standard for at least 27 years (263a). For thirty years, CMS has never operated an all black or all white school. (*Id.*) In sum, CMS's unchallenged good faith commitment to complying with the desegregation orders bore remarkable fruit which the court of appeals described as "[l]ong periods of almost perfect compliance with the court's racial balance guidelines . . . ." (29a).

Schools that were racially identifiable prior to the desegregation process were aggressively targeted by CMS. Some were closed early on. Others have had a remarkable history of racial balance. Specifically, all formerly black schools were racially balanced "for at least twenty-two years . . . ." (275a). The "overwhelming majority" of formerly white schools remain racially balanced. (276a). Attesting to the sea change Charlotte has experienced demographically, most racially identifiable black schools were once racially identifiable white schools. Their change in racial composition was undisputably due to the massive demographic changes this school system has experienced. (*Id.*)

This "remarkable level of desegregation . . ." was also demonstrated by standard measures of racial balance known as the index of dissimilarity and the index of interracial exposure

which were calculated by Respondents' expert witness, Dr. David Armor, who was the same expert used by DeKalb County, Georgia to analyze the effect of demographic change on the racial composition of schools in *Freeman v. Pitts*, 503 U.S. 467 (1992). (264a). The index of dissimilarity "measures the degree of racial imbalance . . ." and the index of interracial exposure measures the average percentage of white students in schools attended by black students. (*Id.*) Under these measures, CMS has been "'highly desegregated' for about twenty years and 'well desegregated' for the remaining years." (*Id.*)

Compared to other comparable unitary school districts "CMS has achieved a higher degree of racial balance . . . ." (*Id.*). During the first decade of desegregation, Petitioners admit that CMS "wa[s] nearly 100% statistically compliant with the court's orders." (29a nt. 5). This outstanding record of compliance continued and converted CMS from a highly segregated school system in 1970 to one with a thirty year history of at least "well desegregated" schools.

**3. The Impact of Demographic Change on Racially Balanced Schools**

Respondent's expert witness Dr. Armor described the effect of the demographic changes in Mecklenburg County as "overwhelming . . . ." (28a-29a). The court of appeals described them as "massive." (28a-29a). The district court found demographic changes in two areas: dramatic growth in predominately white suburban populations in the northern and southern portions of Mecklenburg County and increased density and spreading of predominately black inner city populations to formerly white middle suburban areas in the 1970's which then became "predominately black."(238a). Like most major metropolitan areas, Mecklenburg County experienced a "suburbanization trend . . ." whereby "the inner city and nearby suburbs lost large numbers of white residents as they spread further out into communities along the major arteries extending from down town." (238a). This left an inner

city where "blacks are still more concentrated" and outlying areas that became "highly concentrated . . ." with whites (*Id.*).

The courts below determined that there was "no doubt" that the schools experiencing racial imbalance were impacted by demographic change which began effecting certain CMS schools in the late 1980's. (268a). CMS aggressively compensated for racial imbalance caused by demographic change, by "constantly adjusting the boundaries, adding satellite zones and reassigning students to different schools." (*Id.*). CMS vigorously worked to achieve its desired level of racial balancing, even though it had no legal obligation to employ increasingly strict racial quotas to combat demographically caused racial imbalances. (239a-242a).

Petitioners' contention that the increase in Mecklenburg County's black population resulted in greater racial residential integration is "simply not true." (27a). This fact was also conceded by CMS's own school board chairman, Arthur Griffin, who described Charlotte-Mecklenburg as "'a city of segregated neighborhoods' with '[c]oncentrations of black households . . . generally in the central city." (27a). Today, "blacks are still more concentrated near the inner city, and whites have become highly concentrated in the outer peripheries." (238a). By 1992, "[a]pproximately 50% of all black students lived within [the inner city] while only 10% of white students reside [there] . . . ." (*Id.*) The fact black populations began to become increasingly dense in the inner city while the density of white student populations declined directly caused some inner city schools to slip out of the 60/40 racial balance CMS sought for all schools. (*Id.*, 238a). Additionally, the kind of residential integration Charlotte experienced did not directly correlate with racially integrated schools. In part, this is attributable to a decrease in the white student population "which declined sharply in the 1970's and continued to decrease in the 1980's . . ." with only modest increases in the 1990's. (239a - 240a). Furthermore, large numbers of white students do not attend the public schools.

(240a). In Mecklenburg County, private school enrollment is "almost double the national level." (Id.)

The claim that Mecklenburg County's modest residential integration somehow translates into greater school population integration is also "overly simplistic." (267a). Integrated neighborhoods are confined to "pockets . . ." while "looking at the system as a whole, there are still stark demographic contrasts between the inner city and the southernmost and northernmost areas of the county." (Id.) In 1990, "almost half of the county was comprised of census tracts that were less than 10% black." (270a). In the south, thousands of residential building permits were issued where schools were "already seriously overcrowded . . . ." (271a nt. 25). The northern and southern regions encompass census tracts that are "virtually all white." (277a). These areas have experienced significant growth in their white populations. (279a).

Conversely, the inner city is inhabited by a "high concentration of blacks . . . " making it "impractical, if not impossible, to draw contiguous assignment zones in the inner city and racially balance . . ." inner city schools. (273a). Some of the racially balanced schools located in the middle suburban ring that separates the black inner city and the white outer suburbs fell out of racial balance due to a combination of the black student population spreading outward resulting in "a dramatic decrease in the white school age population and a simultaneous increase in black school age population." (238a, 275a-276a). Correspondingly, there is a "high number of whites in this [middle suburban] area who attend private school." (277a). Consequently, "some of the middle suburban communities that were almost all white in 1970 are now predominantly black." (238a).

It is clear that demographic change, not the violation of the desegregation orders, caused the predominately white middle suburban area, which provided reasonably proximate populations of white students for satellite zones or pairing to racially balance schools that had become predominately black,

to effectively disappear. Furthermore, white population growth was in new developments in suburban areas in the far north and south of the county. These predominately black and white regions were so distant that, according to a report prepared by CMS's Assistant Superintendent Jeffrey Schiller, it was "impossible to populate all schools with a 60% non-black - 40% black ratio and still meet a 60 minute bus ride limit." (271a).

**4. The Impact of Demographic Change on School Sitings**

These "massive" and "overwhelming" demographic changes directly impacted the practicability of siting schools in racially diverse areas of the country. (28a - 29a). Petitioners tacitly conceded the impracticability of siting schools in places other than those selected because they never "called upon the court to intervene in these school citing decisions." (274a) They failed to do so despite the fact that these siting decisions were widely publicized. Likewise, no party at trial was able to identify any suitable alternative sites for the placement of schools that would have fostered more natural integration which was rejected by CMS.

The rapid growth experienced in what had been largely rural areas of the county just twenty years ago caused the schools in the northern and southern portions of the county to become badly overcrowded (23a - 34a). This required construction of new schools. This new construction was also due, in part, to the fact the rush hour traffic patterns made transporting white students from these outer suburbs to inner city schools, impractical due to hour plus bus rides each way (273a).

There was "extensive evidence . . ." that CMS "never sited schools to foster segregation . . . ." (33a) The district court specifically found CMS met the obligation of the desegregation orders to refrain from basing siting decisions "on population growth trends alone." (270a). CMS Assistant Superintendent Jonathan Wells testified CMS routinely considered "racial diversity in its school siting decisions." (*Id.*) In fact, CMS made

"every effort . . ." to site schools to promote racial diversity (33a). Other criteria such as "system [ ] finances, land values, site availability, zoning laws, topography, site size, building capacity, adequacy of public utilities, utilization of adjacent or feeder schools, traffic patterns, and the time and distance to transport students" were also evaluated (270a). CMS was so careful to abide by the desegregation orders that it actually resolved to build schools only where the population was at least 10% black even though compliance with this goal was improbable since "almost half of the county was comprised of census tracts . . ." with less than a 10% black population. (*Id.*) Moreover, strict adherence to the 10% rule would have made it "impossible" to meet the CMS commitment to keeping busing commutes below one hour each way. (271a).

Most schools built since 1980 "have been able to accommodate racially balanced populations every year of their existence." (271a-272a nt. 26). This complied with the desegregation orders which required only that "[b]uildings are to be built where they can readily serve both races." (270a) *quoting Swann v. Mecklenburg County Bd. of Educ.*, 379 F. Supp. 1102, 1107 (W.D.N.C. 1974). Schools built in the last thirteen years have been "in and out of balance" since opening. (272a nt. 26). Yet, demographic change in the form of growth in predominately white areas in the far north and south dictated that schools must be built there (33a). Only four out of twenty-seven new schools have never been racially balanced (*Id.*).

CMS continues to increase "the number of stand alone schools in naturally racially integrated areas. (272a). Indeed, "CMS has purchased property in low growth areas . . . even though schools in predominately white high growth areas continue to be seriously overcrowded and reliant on trailers." (32a) CMS continues to pursue "mid-point" sites despite the fact that schools in high growth outer areas remain "overcrowded and in short supply." (273a).

Ironically, the school siting decisions about which Petitioners complain were "a consequence of racial balancing

requirements." (*Id.*) The district court found that the high concentration of black students located in inner city neighborhoods, coupled with the increasing rush hour traffic problems created by white population growth in the outer areas of the county, caused CMS "to create dozens of tiny satellite zones in the inner city to disperse blacks away while simultaneously drawing white students inward with magnet schools." (274a) If CMS had in fact built more inner city schools in predominantly black areas, it would have "exacerbated this racial balancing dilemma." (*Id.*) The courts below correctly found CMS "coordinated racial balance and school sitings as best it could under the circumstances." (34a).

CMS implemented its magnet school program in 1992, in direct response to the demographic trends that caused the school pairing desegregation technique to "become increasingly unstable. . . ." (242a). Undeniably, these demographic changes began in the early 1980's well before CMS implemented its magnet school program in 1992. (*Id.*, 265a-266a). Dr. Murphy's testimony was conclusive regarding the fact the magnet school program was specifically designed to address the concern "about the increasing difficulty in bringing about racial balance . . . because of the *demographic shifts* that were occurring." (25a). (emphasis added). The magnet school program was intended to replace school pairing and did in fact ameliorate racial imbalances in many schools that lacked an effective pairing partner due to demographic changes. (28a).

**5. The Busing Burden Obligation**

Similar findings were made regarding transportation burdens. The desegregation order itself recognized that "absolute equality in apportioning the burdens . . ." of busing was "impossible to achieve." (274a). Using this standard, the district court found that 42% of non-blacks and 58% of blacks were involuntarily transported for desegregation purposes. Non-blacks, however, were transported by a greater proportion and for longer periods of time for desegregation purposes under

the magnet school program (275a). The district court concluded that "[g]iven the realities of the situation . . . the current situation may be about the best CMS can do while adhering to racial balancing guidelines." (275a)

**6. The Racial Equality of CMS Facilities**

The district court found CMS's facilities were maintained without racial discrimination. The desegregation order specifically held there was no racial discrimination in 1969 with respect to "the quality of school buildings and equipment." (293a) The district court found this to indicate "no vestiges of discrimination in facilities . . . ." (294a) Relying on the most comprehensive and objective data available, including CMS's own facilities expert, the district court found no "disparities along racial lines." (300a) In support of this finding, the court noted that CMS's expert gave his lowest rating to four schools. Two (Elizabeth Traditional and Myers Park Elementary) were majority white in predominately white neighborhoods. (*Id.*). Of the two highest rated schools, one was Morehead Elementary which was a predominately black school in a predominately black neighborhood (300a). Most schools (26 out of 42) described by CMS's facilities expert as needing "major improvements" were either predominately white (18) or racially balanced (8) (301a). This demonstrated that "CMS's facilities needs are spread across the system without regard to the racial composition of its schools." (*Id.*) CMS's facilities expert attributed the cause of these facilities deficiencies "to the age of respective facilities." (*Id.*)

This evidence was corroborated by the testimony of CMS's Assistant Superintendent responsible for facilities. He testified that he was unaware of any facts that linked present inequities to past discrimination (302a). He also identified 108 schools "in need of renovations . . . . " (*Id.*) The overwhelming majority of these schools (81%) were racially balanced or identifiably white (40a). He attributed the problem to "a shortage of funds . . . ." (*Id.*)

**7. CMS's Monitoring of Magnet School Transfers**

Finally, the district court found that CMS did in fact monitor magnet school transfers to ensure they did not adversely impact racial balance. Specifically, CMS's own expert witness admitted on cross examination that CMS "kept an eye on [magnet] transfers so that there wouldn't be a run on the bank so to speak from any one school." (266a-267a nt. 23). Indeed, the district court found, rather than causing segregation, magnet schools "have had an overall effect of countering resegregative trends. . . ." (*Id.*).

## ARGUMENT

### I. THE CLEAR ERROR RULE

"Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman v. Pitts*, 503 U.S. at 474 (1992). When reviewing unitary status cases, federal courts apply a clearly erroneous standard that is highly deferential to the trial court. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 533 (4th Cir. 1985); *Coalition to Save Our Children v. State Board of Education of Delaware*, 90 F.3d 752, 759 (3rd Cir. 1996); *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. 1981); *Keyes v. School Dist. No. 1, Denver Colo.*, 895 F.2d 659, 666 (10th Cir. 1990); *Jacksonville Branch, NAACP v. Duval County School Bd.*, 883 F.2d 945, 952 nt. 3 (11th Cir. 1989). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574 (1985).

This case has been extensively reviewed and considered by the district court and the Fourth Circuit Court of Appeals sitting *en banc*. The Petitioners have not shown the courts below made any material findings which were clearly erroneous, nor have they identified any determinative error of law which would meet this Court's standard for the granting of a Writ of Certiorari. Essentially, Petitioners disagree with the district court's findings of facts. Yet, for every allegation of fact made in the petition, the district court made a corresponding

contradictory finding of fact based on evidence in the record. This kind of disagreement does not warrant granting the petition. Under this court's rules, petitions presenting such matters for review are "rarely granted . . . ." Rules of the S.Ct. of the United States 10.

## II. THE TEMPORARY REMEDY RULE

This school desegregation case began in 1965 (10a). A desegregation order has been in place and the school system has been well desegregated for over thirty years. During that time, two generations of students have passed through CMS. Despite this court's admonition that desegregation remedies are designed to be temporary measures with an end purpose of restoring local control over schools, CMS and Petitioners transformed the desegregation orders from temporary measures designed to remedy past discrimination into "mechanisms for the attainment of different goals." (52a); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). More specifically, CMS wanted the permanent insulation of court supervision to rationalize and perpetuate race-based student assignment plans to foster racial diversity rather than desegregation. As this court said in this case "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971). The evidence of CMS's good faith efforts to desegregate its schools was overwhelming. Petitioners acknowledge that CMS has always demonstrated to the court, the public, and to black parents "its good-faith commitment to the whole of the court's decree. . . ." *Freeman*, 503 U.S. at 491. In fact, CMS went too far in its pursuit of racial balance. As described by the court of appeals, the desegregation orders were "institutionalized" to the degree that CMS cannot "imagine life without them . . . ." (51a) Indeed, both Petitioners and CMS did everything within their power "to keep the orders firmly in place" despite CMS's duty under *Freeman* and *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) to seek restoration of local control (52a). CMS's good faith

commitment to the desegregation orders was so solid the court of appeals concluded it was "unthinkable that CMS will attempt to revive the dual system." (*Id.*)

Now, after decades of highly racially balanced schools, thirty years of good faith compliance,[2] and not a single objection by Petitioners regarding CMS's compliance with the desegregation orders, Petitioners now claim that CMS's rigorous regime of racial quotas, widespread forced busing and annualized efforts to racially rebalance all schools, was not enough, and that court supervision must be reactivated and continue indefinitely. Despite decades of silence, Petitioners suddenly speak of "violations" and "ignored" court orders only because it now appears that the desegregation process has worked. If Petitioners "had ever truly believed a significant violation of the . . . decree had occurred, they certainly would have brought it before this court to seek enforcement of the decree . . . ." *Dowell v. Board of Educ. of Oklahoma City*, 8 F.3d 1501, 1512 nt. 8 (10th Cir. 1993). Petitioners' deafening silence for nearly thirty years means they have "all but conceded good-faith compliance . . . ." *Id.*

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[2] Since the desegregation orders were entered, CMS has always maintained a system that was "well desegregated." (264a). For the first twenty years of this desegregation order, CMS was "highly desegregated" and for the first decade of the order, CMS was nearly perfectly desegregated. (*Id.*; 29a nt. 5). By comparison, the school system held unitary in *Freeman* was only desegregated "for . . . a short period under the court-ordered plan . . . ." *Freeman*, 503 U.S. at 478.

### A. The Declaration of Unitary Status Does Not Conflict with Other Circuits and Does Not Decide an Unsettled Question of Federal Law

Well settled standards now govern the unitary status inquiry. See *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992). The circuit courts have uniformly followed these decisions in declaring numerous school systems unitary. *See Dowell*, 8 F.3d 1501; *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3rd Cir. 1996); *Lockett v. Board of Educ. of Muscogee*, 111 F.3d 839 (11th Cir. 1997); *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999); *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001); *Manning v. School Bd. of Hillsborough County*, 244 F.3d 927 (11th Cir. 2001); *cert. den.* _____ U.S. _____, 122 S.Ct. 61, 151 L.Ed.2d 28 (2001); and *NAACP, Jacksonville Branch v. Duval County Schools*, 273 F.3d 960 (11th Cir. 2001). The Fourth Circuit's decision in this case is consistent with the cited decisions of the Third, Sixth, Seventh, Tenth and Eleventh Circuits.

The Fourth Circuit's decision in this case does not conflict with the decisions in these other unitary status cases and does not plow new ground of unsettled law. Despite the fact that many of these circuit decisions applying *Freeman* and *Dowell* guided the Fourth Circuit, Petitioners cite none of them. Yet, these decisions followed the same path as this case, applying the principles this court established in *Freeman* and *Dowell*. Therefore, it is clear that no circuit conflict and no unsettled questions of law require this court's review of this case.

In *Manning v. School Board of Hillsborough County*, *supra*, the Eleventh Circuit held the Hillsborough County Schools were unitary where current racial imbalances were found to be substantially caused by demographic change. *Manning*, 244 F.3d at 946. Like Petitioners, the plaintiffs in *Manning* argued that demographic shifts were not the sole cause of racial

imbalances. *Id.* This court, however, declined to review *Manning*. It should do the same in this case because no new issues are presented.

On October 1, 2001, this Court denied certiorari in *Manning*, *supra*, a school desegregation case which Petitioners described in their briefing before the court of appeals as having "statistics of compliance and demographic patterns very similar to those in CMS." (Swann Plaintiff's Appellate Brief pp. 39-40). Curiously, Petitioners have not cited *Manning* in this Court. This Court should decline to hear any unitary status issues in this case for the same reasons it declined to hear *Manning* since it presents no conflict with the decisions of this Court or the circuit courts.

### B. CMS's Magnet School Program Did Not Resegregate and Was Tacitly Approved of by Petitioners

Petitioners' admissions, concessions, and conduct, as thirty year parties to this case deflate their current claims that the courts below erred. For example, Petitioners do not challenge the appeals court's holding that CMS had "[l]]ong periods of almost perfect compliance with the court's racial balance guidelines, coupled with some imbalances in the wake of massive demographic shifts . . . ." (29a). Instead, Petitioners' appellate strategy is to myopically complain about CMS's 1992 magnet school plan which they contend caused "a number of schools" to fall "outside of racial enrollment guidelines" (Petition at 16). However, Petitioners do not identify any particular schools that became racially identifiable by an alleged failure to monitor magnet school transfers. Magnet schools had an integrative effect on CMS rather than the alleged segregative effect.

Petitioners concede the district court's findings that "magnet schools have had an overall effect of countering resegregative trends, and a higher percentage of black students would have attended predominately black schools had the magnet schools not existed." (266a nt. 23). The district court specifically found

magnet schools racially balanced six racially identifiable schools (266a). Accordingly, there is no evidentiary support for Petitioners' conclusory assertion that CMS's increase in the number of magnet schools increased the number of racially identifiable schools.

Dr. Murphy, the Superintendent that implemented the magnet school program, testified it was specifically designed to combat racial imbalances caused by demographic change (25a). It is therefore axiomatic that the racial imbalances caused by demographic change had to occur before implementation of the magnet school program(265a). The magnet school program "helped to restore and maintain racial balance in schools that were rapidly becoming imbalanced" due to demographic changes (266a nt. 23, 28a), and CMS's own expert testified that CMS did monitor magnet school transfers (266a nt. 23) to insure they had the desired ameliorative systemwide effect on racial balance. Remarkably, Petitioners omit any reference to their own expert witness who conceded at trial that magnet schools never caused a school to fall out of compliance with the desegregation orders (Trial Testimony of Leonard Stevens, pp. 182-183).

Petitioners' disagreement about the inferences properly drawn from these facts by the courts below does not warrant this Court's review by writ of certiorari. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Clearly, the district court held that it was beyond doubt that "demography and geography have played the largest role in causing imbalance." (268a). This Court has said "the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971). More specifically, in light of the uncontested evidence of "[l]ong periods of almost perfect compliance . . . coupled with some imbalance in the wake of massive demographic shifts . .

." this Court has held that "it becomes less likely that a current racial imbalance . . . is a vestige of the prior de jure system." (29a) *Freeman*, 503 U.S. at 496. When viewed in light of CMS's unchallenged good faith efforts to eradicate the dual system, any causal link to the dual system "is even more attenuated . . . ." *Id.*

### C. *Freeman* is Controlling Authority in this Case

Petitioner's argue this case in distinguishable from *Freeman* because of the 1992 implementation of the magnet school program. However, because the magnet school program was adopted in an effort to counteract demographic change, the case falls squarely within *Freeman's* holding that demographic changes and the efforts to combat them do "not have constitutional implications." *Freeman*, 503 U.S. at 495. Conspicuously, Petitioners do not claim that CMS's decision to implement magnet schools violated the desegregation order. That is because Petitioners effectively approved of this effort to combat demographic change by not objecting in the district court until the unitary status trial held over seven years later. Moreover, the magnet schools were found by the district court to have had a positive, integrative effect on the school system as a whole (266a nt. 23). Since CMS's increase in magnet schools was motivated by constitutionally inconsequential demographic changes, *Freeman* controls this case and Petitioners' disagreement with this application of the law does not warrant review by this court.

Petitioners' also attempt to distinguish *Freeman* by alleging that the demographic change in this case was not as significant as that presented in *Freeman*. However, the district court found, and Petitioners concede, that there was no evidence "that CMS has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." (268a) "In fact, the opposite is true; CMS openly encouraged and endorsed policy initiatives that promote integrated communities." (*Id.*) The district court found

demographic change was the causal agent for all racial imbalances in CMS. The court of appeals described these demographic changes as "massive . . ." and adequately explained "why a few schools have become imbalanced." (29a). Furthermore, even though it was not obligated to do so, CMS instituted changes in its student assignment practices to counteract what one expert witness described as "overwhelming demographic growth and mobility."(28a)

There is no requirement under *Swann* and *Freeman* that demographic change must be of a certain magnitude to qualify as a change that lacks constitutional significance. *Freeman* does not require the qualifiers of "massive" or "dramatic" demographic change as a condition of its holding that school districts are under "no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494. Rather, Freeman merely establishes that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications." *Id.* at 495. In this very case, this court has said "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies. . ." when demographic change causes imbalanced schools. *Swann*, 402 U.S. at 31-32.

This conclusion is identical to those reached by other appellate courts under substantially identical circumstances. *See Manning*, 244 F.3d at 944, *cert. den.* _____ U.S. _____, 122 S.Ct. 61 (demographic change substantially caused racial imbalances); *United States v. Meriwether County*, 171 F.3d 1333, 1339 (11th Cir. 1999) (demographic change need not be reversed); *Dowell*, 8 F.3d at 1517 (residential segregation not traceable in a proximate way to segregated schools) *Lockett*, 111 F.3d at 843 (racial imbalances due to demographic change not causally linked to past discrimination); *Reed*, 179 F.3d at 467 (demographic changes causing racially imbalanced schools do not prevent unitary status); *Duval County School Bd.*, 273 F.3d at 972 (unitary status proper because school board not

responsible for segregative effects of demographic change). In each of these cases, the demographic change that caused the racially imbalanced schools was comparable to that which was found to operate in Charlotte-Mecklenburg. In each case, unitary status was found to be proper. Given the uniformity of the circuits on this issue, there is no reason for this court to intervene and provide guidance where all circuits are in accord on how *Freeman* is to be applied in unitary status cases.

The court of appeals directly addressed Petitioners' argument at length concluding that "*Freeman* cannot be distinguished into nothingness, nor does the standard of review permit this court to re-weigh the evidence of the changes in CMS." (27a). Yet, Petitioners persist by making the same arguments in this Court they made below and requesting this court's review of this case merely because they disagree with the holding of *Freeman*. This is quintessentially the type of case that does not warrant the granting of a writ of certiorari. Supreme Court Rule 10(b).

### D. CMS's School Siting Decisions Complied with the Desegregation Orders

Petitioners' arguments regarding school siting are inextricably intertwined with the impact which racial demographic change had on CMS's student assignments. Indeed, CMS's school siting decisions were driven by a combination of factors outside of its control such as demographic change, geography and its court ordered racial balancing obligations. Petitioners falsely claim that the desegregation orders "required CMS to locate schools in places readily accessible to both races . . . ." (Petition at 20). Actually, the desegregation orders were less restrictive than Petitioners imply, requiring only that school siting "**was not to be predicated on population growth trends alone**" and that "consideration is to be given to the influence new building can be toward simplification of an integrated student assignment plan." (270a), citing, *Swann*, 379 F. Supp. at 1107 (emphasis added).

Since 1980, fifteen out of the twenty seven new schools have always served both races and an additional six have gone in and out of racial balance (272a nt 26). These schools readily serve all races. Based upon the undiputed evidence that 21 out of 27 schools built since 1980 have served both races, the district court concluded there were no "continuing violations in the area of school siting." (274a).

Of the remaining six schools, four were built in areas that underwent dramatic demographic change in the form of explosive population growth that caused existing schools to be "overcrowded and in short supply." (273a). The desegregation decree specifically acknowledged that overcrowding was "unrelated to desegregation . . ." and "not a constitutional problem . . . ." *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 334 F. Supp. 623, 631 (W.D.N.C. 1971). The district court also concluded that CMS's school siting decisions were "a consequence of racial balancing requirements" which, when coupled with traffic problems, and geographic and demographic challenges, meant that CMS had little choice but to place the schools where it did. (273a). Petitioners concede that CMS did not site schools based "on growth trends alone," but "routinely . . ." considered "racial diversity in school siting decisions" together with a host of other race neutral criteria. (270a).

**E. *Penick, Brinkman* and *Swann* are Inopposite**

Contrary to Petitioners contention, the court of appeals did not ignore *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) or *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). None of these cases are implicated by this record because they dealt with school board action that was not prompted by intervening demographic change. In *Freeman*, this court specifically distinguished *Penick* and *Brinkman* in the context of findings that demographic change rather than the absence of school board good faith, caused racial imbalances. *Freeman*, 503 U.S. at 494. In this case, the appeals court found

that CMS's school siting obligations and demographic change that created overcrowding "pulled CMS in different directions. . . ." (34a) *Freeman* resolves this dilemma by holding that school systems have "no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494. CMS did not create the demographic changes it was required to address. Accordingly, *Penick* was irrelevant to the facts before the Fourth Circuit because it involved a school system abdicating its good faith compliance duty. By contrast, this case involves a school system acting in good faith in response to demographic change as allowed by *Freeman*.

This case does not implicate "the continuing vitality of the principles established in *Swann* and *Penick* . . . ." (Petition for Writ of Certiorari at 20). Instead, this case involves vastly different facts than *Penick* and *Swann* which *Freeman* itself distinguished. *Swann* itself acknowledged that "in the absence of a showing that . . . school authorities . . . deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Swann*, 402 U.S. at 32. Most importantly, this case, unlike *Swann* and *Penick*, involved *Freeman's* teaching regarding how demographic change impacts the unitary status inquiry after nearly thirty years of good faith desegregation efforts. Therefore, *Swann* and *Penick* remain viable; albeit of no relevance to the resolution of this case.

## III. THE COURT OF APPEALS DID NOT APPLY AN INTENTIONAL DISCRIMINATION STANDARD FOR ASSESSING WHETHER ANY CONTINUING VESTIGES OF PAST DISCRIMINATION EXISTED IN FACILITIES, TRANSPORTATION AND SCHOOL SITING

Petitioners seem to misunderstand the rationale for the courts' conclusions that CMS did not operate racially discriminatory facilities. The court did not uphold unitary status because there was no intentional discrimination. Instead, the

court found that any disparities were attributable to factors other than race such as "the age and location of the facilities and the ever-present problem of allocating all to scarce funds." (40a-41a) In other words, the conditions of CMS's facilities were caused by forces outside of its control and, just as the district court found in 1969, it concurred in 1999 that there was no constitutional violation regarding facilities (42a).

The lower courts also concluded CMS did not violate the desegregation orders with respect to school siting. The court of appeals cited record evidence that CMS affirmatively made "every effort" to site schools that would foster integration (33a). Far from following an intent standard, the lower courts relied on hard evidence that showed CMS took affirmative steps to comply with the school siting provisions of the desegregation orders, and affirmatively complied with its school siting obligations (33a-35a).

Likewise, regarding busing burdens, the lower courts concluded that CMS complied with the court's orders to the extent practicable (35a). The courts below consistently applied a standard that was more vigorous than intent when assessing whether CMS eradicated all vestiges of past discrimination. Specifically, they applied this Court's standard in *Dowell* and *Freeman* which focuses the "effectiveness"analysis on "whether the vestiges of past discrimination had been eliminated to the extent practicable." *Dowell*, 498 U.S. at 250, *Freeman*, 503 U.S. at 492.

## IV. CMS COMPLIED WITH ALL DESEGREGATION ORDERS TO THE EXTENT PRACTICABLE

The courts below specifically found CMS complied with all desegregation orders (long periods of almost perfect compliance, 29a; school siting compliance, 32a; busing burdens compliance, 35a; student transfer compliance, 36a). Petitioners have no evidentiary basis for their claim that "the trial record showed that the system had never complied with express orders designed to further desegregation." (Petition at 23). Petitioners'

assertions that CMS "admitted" non-compliance ignores the collusive alignment of Petitioners and CMS at trial. CMS wanted to remain under the race-conscious student assignment plan for the foreseeable future in order to use the desegregation orders as a shield and pretext for the racial quotas it believed fostered "diversity."

The district court specifically found CMS resisted a declaration of unitary status and allied itself with Petitioners "because it now wishes to use that order as a pretext to pursue race-conscious, diversity enhancing policies in perpetuity." (227a) The appeals court likewise found CMS was using the desegregation orders as "mechanisms for the attainment of different goals" than eradicating vestiges of past discrimination (52a). Accordingly, Petitioners' allegations of "admitted" non-compliance must be seen for what it is, a collusive effort to indefinitely perpetuate race-conscious student assignments in CMS even though the facts showed all vestiges of past discrimination have been eradicated to the extent practicable. This baseless allegation of a "record of non-compliance . . ." was thoroughly addressed by the lower courts and found to be factually meritless. *Id.*

The lower courts found CMS complied with all of its desegregation duties to the extent practicable (55a, 345a). Petitioners again confuse practicability with possibility and seek this court's review because they claim it is still possible to do more racial balancing. But, "[r]acial balance is not to be achieved for its own sake." *Freeman*, 503 U.S. at 494. This court's standard for assessing whether court supervision is necessary is focused on whether "these vestiges of past discrimination had been eliminated to the extent practicable." *Freeman*, 503 U.S. at 492. Following *Freeman*, the court of appeals addressed Petitioners' argument by observing that adopting their standard "would effectively replace *practicability* with *possibility*." (34a)

Applying *Freeman's* practicability standard, the court of appeals addressed Petitioners' school siting complaints. It

concluded that a host of limitations beyond CMS's control including, population growth in Mecklenburg's far north and south areas, the desegregation decree itself, and traffic burdens limited what CMS could practicably do in selecting sites for new schools (34a-35a). However, as the court stated, "a plethora of evidence . . ." demonstrated that CMS "used its best efforts to site schools in order to foster integration . . . ." (35a) Curiously, Petitioners concede this point describing the "heart of the Dowell/Freeman test . . . ." as requiring school systems to "eliminate the vestiges of past discrimination to the extent practicable." (Petition at 25). Once again, Petitioners' disagreement with the findings of fact below do not warrant this Court's review.

## V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING A NEW STUDENT ASSIGNMENT PLAN DEVELOPED JUST PRIOR TO TRIAL

Petitioners also seek a writ of certiorari based on a routine evidentiary ruling based on Rule 403 of the Federal Rules of Evidence. Such a ruling obviously presents no conflict in the circuits and does not implicate any decision of this court. It hardly qualifies as one of the "compelling reasons" contemplated by Supreme Court Rule 10.

Petitioners do not fully disclose all the relevant facts surrounding the district court's evidentiary ruling during the trial concerning CMS's so-called "remedial plan." CMS developed this theoretical assignment plan "at the eleventh hour," and presented it to the court and Respondents one week before trial in violation of the court's pretrial orders, "after the deadlines for fact discovery and expert witness discovery had expired . . . ." (280a nt. 28 - 281a). Even though the district court actually considered and admitted substantial portions of the excluded "evidence," it declined to admit this untimely and "certainly cumulative" compilation of documents, which was

devised as an "eleventh hour strategy." (*Id.*). This evidence largely consisted of expert reports which were actually admitted at trial and considered at length by the district court. (282a, 54a). The court of appeals held this type of evidence was discretionarily excludable, citing *Fed. R. Evid.* 403. (54a).[3]

The district court found "that CMS has complied fully and satisfactorily with the student assignment aspects of the court ordered desegregation plan" and that all vestiges had been eliminated (283a). As a result, there was no need to consider the remaining proposals in the plan to eradicate any alleged vestiges which did not exist. (Id.). The court of appeals affirmed this reasoning pointing out that the district court "did address compliance . . .". (53a). Because the district court also found that CMS's past compliance successfully eradicated all vestiges of past discrimination (227a, 345a), any consideration of future racial balancing was irrelevant because the district court found that any existing imbalances were caused by demographic change, geography and other factors outside of

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[3]Importantly, the district court did not foreclose considering those parts of the so-called "remedial plan" relating to a proposed future student assignment plan if it determined that all vestiges of past discrimination had not been eradicated to the extent practicable (280a nt. 28, 374a). Accordingly, the court excluded the cumulative portions of the plan and withheld considering the remaining part of the plan, which consisted of a new, untested "controlled choice" student assignment plan until such time as it appeared that further remediation of vestiges was necessary. (*Id.*, 280a nt 28, 281a).Essentially, the court decided that the order in which it would consider CMS's "evidence" required, as *Freeman* dictates, that it first evaluate whether vestiges of past discrimination remained in CMS and only then was it willing to determine if additional, allegedly practicable measures were necessary to eradicate those vestiges (*Id.*).

CMS's control. (268a). This is precisely what *Freeman* requires since "[o]nce the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494 citing *Swann*, 403 U.S. at 31-32. Demographically caused imbalances have no "constitutional implications" and are beyond the court's "practical ability . . . to try to counteract . . . ." *Id.* at 495. Under *Freeman*, the district court correctly concluded that CMS "had no duty to achieve system wide racial balance in the student population." *Id.* at 496. *Freeman* explicitly rejects the notion that "heroic measures must be taken to ensure racial balance in student assignments system wide." *Id.* at 493. Consequently, the district court's evidentiary ruling to exclude the cumulative portions of CMS's plan, and delay consideration of the remainder of the plan focused on further racial balancing until after it evaluated whether existing imbalances were vestiges of past discrimination was not error.

Petitioners' argument that the district court erred by refusing to consider CMS's proposed remedies prior to determining if there remained any vestiges effectively places the cart before the horse. Petitioners' argument assumes there were continuing vestiges in need of remediation. As Petitioners would have it, the district court committed reversible error by refusing to consider remedies before identifying lingering constitutional violations. But *Freeman* requires exactly the opposite. Under *Freeman*, a district court must first determine whether racial imbalances are traceable to de jure discrimination before evaluating the practicability of proposed remedies. *Freeman* explicitly states that a district court "may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations." *Freeman*, 503 U.S. at 491. *Freeman*, and simple logic, require that a district court's vestiges analysis must precede any remedies inquiry. That is exactly what the district court did and what the court of appeals affirmed.

## CONCLUSION

Over thirty years ago, CMS implemented a court ordered desegregation plan, which this Court has held was designed "[f]rom the very first, . . . as a temporary measure to remedy past discrimination." *Dowell*, 498 U.S. at 247. In the course of those thirty years, CMS has always maintained at least a "well desegregated" school system (264a). For the first ten years CMS was almost perfectly desegregated. For twenty years, CMS maintained a "highly desegregated" system. With the grant of unitary status, the "end purpose" of remedying past discrimination and restoring local control of the Charlotte-Mecklenburg Schools has been accomplished. *Freeman*, 503 U.S. at 490.

While it is common "for plaintiffs in school desegregation cases to allege . . . that racial imbalances in student assignments, are a 'vestige of discrimination'" nothing could be further from the truth in this case. *Manning*, 244 F.3d at 942. CMS, as demonstrated by overwhelming evidence, has acted in good faith to comply with the desegregation orders and has demonstrated that "it is unthinkable that CMS will attempt to revive the dual system." (52a) CMS's eradication of the dual system was so complete that it "institutionalized" the desegregation orders to the point that it abandoned their remedial purpose only to use them "for the attainment of different goals." (51a - 52a) On this record, there can be little doubt that the objectives of school desegregation have been entirely accomplished in CMS.

Petitioners have failed to demonstrate any reasons why the decisions of the lower courts should be reviewed. They offer only disagreement with the factual findings of the district court together with arguments premised on misguided interpretations of this court's school desegregation precedents. They concede that the Fourth Circuit's decision is compatible with the decisions of all appellate courts in the area of school desegregation and that there are no important undecided questions presented by this case. Rather, Petitioners' goal is

simply to prolong court supervision of this case well beyond any rational limits. For these reasons, their Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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